

# INDEX

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	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes involved.....	2
Statement.....	2
Argument.....	6
Conclusion.....	14
Appendix.....	15

## CITATIONS

### Cases:

<i>Blair v. United States</i> , 250 U. S. 273.....	10
<i>Bowles v. Baer</i> , 142 F. 2d 787.....	6
<i>Endicott Johnson Corporation v. Perkins</i> , 317 U. S. 501.....	6, 8
<i>Interstate Commerce Commission v. Brimson</i> , 154 U. S. 447.....	10, 11
<i>McGarry v. Securities and Exchange Commission</i> , 147 F. 2d 389.....	11
<i>McMann v. Securities and Exchange Commission</i> , 87 F. 2d 377, certiorari denied, 301 U. S. 684.....	11
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U. S. 41.....	10
<i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U. S. 186.....	6,
	8, 9, 10, 13
<i>Penfield Company of California v. Securities and Exchange Commission</i> , 143 F. 2d 746, certiorari denied, 323 U. S. 768.....	9
<i>Perkins v. Endicott Johnson Corporation</i> , 128 F. 2d 208, affirmed, 317 U. S. 501.....	9
<i>Wilson v. United States</i> , 221 U. S. 361.....	10, 11

### Statutes:

Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a et seq.):	
Section 19 (b).....	11, 15
Section 20 (a).....	15
Section 22 (b).....	5, 11, 15
Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. 78a et seq.):	
Section 21 (a).....	16
Section 21 (b).....	11, 17
Section 21 (c).....	5, 11, 17

### Miscellaneous:

Wigmore, <i>Evidence</i> (3d ed. 1940), Vol. 8, §§ 2192, 2193....	10
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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 789

VACUUM CAN COMPANY, A CORPORATION, AND  
BURTON O. SMITH, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE  
COMMISSION IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (R. 39-45) is not reported. The opinion of the circuit court of appeals (R. 35-39) is reported at 157 F. 2d 530.

JURISDICTION

The judgment of the circuit court of appeals was entered on September 16, 1946 (R. 39). The petition for a writ of certiorari was filed on December 16, 1946. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, which is made applicable by Section 22 (a) of the Securities Act of 1933 (15 U. S. C. 77v (a)) and Section 27 of the Securities Exchange Act of 1934 (15 U. S. C. 78aa).

#### **QUESTIONS PRESENTED**

1. Whether both courts below correctly held that the corporate books in question were not irrelevant to the Commission's inquiry.
2. Whether, in view of the definite and limited scope of the subpoena involved, there is here any violation of the Fourth Amendment.

#### **STATUTES INVOLVED**

The applicable provisions of the Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a *et seq.*) and the Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. 78a *et seq.*) are set forth in the Appendix, *infra*, pp. 15 *et seq.*

#### **STATEMENT**

On October 12, 1945, the Commission, by order (R. 5), instituted an investigation to determine whether one Marie Mayer had engaged in a scheme to defraud in the sale of stock of petitioner, Vacuum Can Company, in violation of the federal securities laws. Information reported to the Commission indicated that in September, 1944, Mayer in selling stock of Vacuum Can at

\$90 per share falsely represented that Vacuum Can was about to split its stock and pay a \$10 dividend on the new shares and also failed to disclose that such stock had been purchased for \$10 per share only six days before (R. 6). The order declared it to be the purpose of the inquiry to investigate these facts and "any acts and practices of similar purport or object" (R. 6).

One Orris J. Pothast, general agent for an insurance company, stated that Marie Mayer sold him 50 shares of Vacuum Can stock in September, 1944, at \$90 per share (R. 14); that he was induced to make the purchase by her statements that she held \$70,000 of stock in Vacuum Can, that, as petitioner Smith, president of Vacuum Can, had informed her, the stock would soon be split on the basis of ten new shares for one old share and a dividend of \$10 would be paid on each new share, and that the stock was closely held and practically impossible to obtain (R. 14).<sup>1</sup> Pothast also stated that he later ascertained from petitioner Smith that the corporation had no

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<sup>1</sup> Pothast was induced to make this purchase at \$90 per share, despite the fact that six days earlier he had purchased 10 shares at \$12.25 per share, by her statements that his 10-share purchase was from an estate in liquidation and that she was sure he could not get additional stock in that way. That the latter statement was probably misleading appears from the fact that he was able to acquire, during the following six months, a total of 125 shares at prices of \$16 and \$17 per share (R. 14-15).

such plans regarding splitting of the stock, or payment of a dividend thereon (R. 15).<sup>2</sup>

In order to determine whether, in connection with this and other transactions of similar purport or object, a scheme to defraud had been devised, it was important to ascertain the facts with respect to Mayer's indicated misrepresentations and whether she had sold Vacuum Can stock to others by means of these or similar misrepresentations.<sup>3</sup> Sources of information with respect to such representations included the stock books and stock ledgers of the company and certain correspondence between the company and Mayer, Pothast and others.<sup>4</sup> Consequently, on November 30, 1945, subpoenas *duces tecum* were duly directed to petitioners (R. 8-11), requiring them to appear and produce certain books and records of Vacuum Can covering the period

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<sup>2</sup> The transaction between Mayer and Pothast was rescinded on October 26, 1945, after the Commission's investigation had commenced. Pothast received a check for \$4,500 made payable to and endorsed by Mayer's attorney, and Pothast endorsed his stock certificate for 50 shares in blank and delivered it to the attorney (R. 15).

<sup>3</sup> Pothast's affidavit states among other things that on February 6, 1946, Mayer asked him to sign an affidavit in order to "relieve her 'over at the Securities and Exchange';" that he refused to sign because of the statement therein that she did not recommend or offer to sell Vacuum Can stock to him; and that she said the affidavit had been prepared for his signature by petitioner Smith (R. 22).

<sup>4</sup> Mayer had refused to testify before a Commission officer concerning her transactions in Vacuum Can stock, claiming her privilege against self-incrimination (R. 16).

from July 1, 1942, to the date of the subpoenas, viz., its stock certificate book including stubs and cancelled stock certificates, stock ledgers, and correspondence between the company and eleven named persons including Mayer and Pothast. Petitioners produced the correspondence but refused to produce the stock certificate book and ledgers described in the subpoenas. Instead, they sought to govern the scope of the Commission's inquiry by tendering only those portions of the books which specifically referred to Mayer, Pothast and the other persons named in the subpoenas. (R. 3-4, 25.)

On February 5, 1946, the Commission applied to the district court for enforcement of the subpoenas with respect to Vacuum Can's stock certificate book and ledgers, pursuant to Section 22 (b) of the Securities Act and Section 21 (c) of the Securities Exchange Act, Appendix, *infra*, pp. 15 *et seq* (R. 1-5). The district court, after hearing, determined that the records were not plainly irrelevant to the investigation, upheld the reasonableness of the subpoenas, and granted the Commission's application, specifically ordering petitioners to produce the stock certificate book and ledgers described in the subpoenas (R. 28-29). The circuit court of appeals, on motion of the Commission, dismissed petitioners' appeal from the district court order (R. 39) on the ground that "the appeal is so clearly without

merit that we think it apparent that it was taken for delay only \* \* \* " (R. 39).

#### ARGUMENT

1. The gist of petitioners' argument is that the books and records of Vacuum Can required to be produced by the order of the district court are not relevant to the Commission's investigation (Pet. 11-15). This argument has no merit. At the outset, it should be noted that petitioners concede the controlling authority of decisions of this Court which uphold the right of an administrative agency to enforcement of its subpoenas upon a showing merely that the evidence sought is "not plainly incompetent or irrelevant to any lawful purpose" of the agency in the discharge of its duties under the Act. See *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 509; *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186.<sup>5</sup> Petitioners also concede that such right should not be "narrowly limited" (Pet. 11).

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<sup>5</sup> Petitioners misconstrue the rulings below and the opinion in *Bowles v. Baer*, 142 F. 2d 787, 789 (C. C. A. 7), as holding that the district court's function in enforcing an administrative subpoena is "purely ministerial," in consequence of which they ask that these rulings should be "discredited" (Pet. 14). Actually, however, the district court below simply followed the rule enunciated by this Court in *Endicott Johnson v. Perkins*, 317 U. S. 501 (R. 43). The district court states, "Under the statute the Commission has a right to request any evidence which is not plainly irrelevant to the investigation being conducted by it," and declared its belief that the record showed the Commission's demand for the corporate records to be reasonable (R. 45). The *Bowles* case merely holds

As the court below held (R. 37), the evidence sought by the Commission is relevant to a lawful inquiry, namely, a determination whether there have been violations by Marie Mayer of the federal securities laws in the sale of securities of petitioner, Vacuum Can, and "any acts and practices of similar purport or object" (R. 6). Under the Commission's order for investigation, it was clearly pertinent to inquire into not only the allegedly false representations and fraudulent concealment of material facts set forth in the order which relate to Mayer's sale to Pothast, but also any other representations alleged to have been made by her to Pothast, e. g., that she held \$70,000 worth of Vacuum Can stock and that the stock of the company was closely held. Obviously the stock books in question were relevant to an inquiry into the truth or falsity of such statements. Further, the investigative order makes relevant any purchases or sales of Vacuum Can stock which Mayer may have transacted with persons other than Pothast, and the stock books would be a prime source of information with respect to such transactions.

Petitioners' offer to produce only that portion of the stock record books of Vacuum Can which

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that the district court, in the absence of any regulative statutory provision, cannot control the "*manner* in which the investigation was to be conducted" (italics supplied), and that therefore an administrative agency could exclude the public from an *ex parte* investigation, as opposed to an adversary hearing.

mentions the names of Mayer, Pothast and the others named in the subpoenas on the ground that the balance of these records are irrelevant to the inquiry, would in substance require the Commission to prove in advance of its investigation the relevancy of each page in a subpoenaed book or record. This would impose an onerous burden on the Commission and hamper, if not prevent, its investigations and defeat the purpose of the statutes. It is obvious that a limitation of the Commission's investigative scrutiny to those records which disclose the names of Mayer and the others named in the subpoenas would exclude records which, while not naming these persons, may well furnish leads to transactions involving Mayer.\* Such a limitation, this Court has indicated, will not be sanctioned. See *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 213, 215-217; *Endicott Johnson Corporation v. Perkins*, 317 U. S. 501, 507-509.

2. The foregoing showing that the subpoenaed records were not plainly irrelevant to the Commission's inquiry disposes, we submit, of petitioners' contention that enforcement of the subpoenas herein would constitute an unreasonable search and seizure in violation of the Fourth Amendment because the records sought by the

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\* For example, it appears that Mayer was selling some stock not carried on the books in her name (R. 25-26).

Commission are irrelevant (Pet. 12).<sup>7</sup> Nor is the demand for the records otherwise unreasonable within the meaning of the Fourth Amendment, as petitioners argue. The subpoenas specifically describe the books and records sought by the Commission in its investigation under the Acts and cover a limited period of time. This Court has held reasonable similar subpoenas substantially broader in scope than those in the instant case. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 210, n. 46; *Perkins v. Endicott Johnson Corporation*, 128 F. 2d 208, 210 (C. C. A. 2), affirmed, 317 U. S. 501; see *Penfield Company of California v. Securities and Exchange Commission*, 143 F. 2d 746 (C. C. A. 9), certiorari denied, 323 U. S. 768.

Petitioners' assertions respecting "detriment and embarrassment" to Vacuum Can (Pet. 18) furnish no basis for refusing the Commission enforcement of its clearly lawful investigative proc-

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<sup>7</sup> Petitioners take exception to language in the opinion of the court below (R. 38) which, they assert, "appears to state that the Petitioners are not entitled to protection of the Fourth Amendment because only corporate records are involved" (Pet. 15). We cannot accept this construction of the opinion. The court below, quoting from this Court's opinion in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, makes it clear that no unreasonable search and seizure was involved in the instant case because, among other things, the subpoenaed records were relevant to the Commission's investigation (R. 37).

esses. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 217; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52.<sup>8</sup> The obligation to respond is in the public interest and arises out of the general obligation of citizenship. *Wilson v. United States*, 221 U. S. 361, 385; see *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 476; 8 Wigmore, *Evidence* (3d Ed. 1940), §§ 2192, 2193. As stated by this Court in *Blair v. United States*, 250 U. S. 273, 281:

\* \* \* the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned \* \* \*. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, [is] \* \* \* necessary to the administration of justice according to the forms and modes established in our system of government \* \* \*

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<sup>8</sup> Petitioners refer to affidavits filed by them in the district court after the close of the hearings on the Commission's application for an enforcement order as indicating that the Commission was attempting to convey the impression in an interview with a stockholder of Vacuum Can that Vacuum Can was making misrepresentations to purchasers of its stock and that such impression was also conveyed in a newspaper account (Pet. 6, 18; R. 26-28). It is apparent, however, that any inquiry made in the course of an investigation, no matter how tactfully conducted, may tend to raise questions in the mind of the person being interviewed.

Moreover, the mere fact that Vacuum Can is not itself under investigation (see Pet. 12-14) does not render the required production of its records unreasonable. *Wilson v. United States*, 221 U. S. 361, 385; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 476; *McGarry v. Securities and Exchange Commission*, 147 F. 2d 389, 392 (C. C. A. 10); *McMann v. Securities and Exchange Commission*, 87 F. 2d 377 (C. C. A. 2), certiorari denied, 301 U. S. 684; and see Sections 19 (b) and 22 (b) of the Securities Act, and Sections 21 (b) and (c) of the Securities Exchange Act, Appendix, *infra*, pp. 15 *et seq.*

Petitioners' contention that the requirement to produce Vacuum Can's records is unreasonable because only a single sale of 50 shares of stock is involved (Pet. 19), misconceives the nature and scope of the present inquiry. For example, as shown above, the purpose of the investigation embraces not only Mayer's sale to Pothast, but also any sales of Vacuum Can stock which she may have made to others in violation of the Acts. But even if the investigation were confined to an isolated sale of 50 shares of stock, there is nothing in the statutes to warrant petitioners' statement that "it would seem that the Securities and Securities Exchange Acts were not designed to detect and bring to punishment fraud in such an isolated sale of stock" (Pet. 19). On the contrary, the statutes clearly show a legislative intent to pre-

vent and deal with fraud in the sale of securities, irrespective of the size of the transaction or the number of sales involved. Indeed, petitioners concede that the Commission has jurisdiction to investigate such an "isolated" sale of stock (Pet. 11, 19).

Finally, there is no merit in petitioners' contention that no useful purpose would be served by producing the stock record books because the record made in this proceeding shows the falsity of Mayer's representations (Pet. 16-17). This amounts to a claim that the Commission may be limited to one piece of proof for each fact necessary to establish a violation. The burden of proof incident to criminal prosecutions underscores the untenability of such a position.\* In any event, the statutes here involved do not contemplate that the Commissioner's investigative functions shall be limited by whatever affidavits are filed in a subpoena enforcement proceeding.

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\* Moreover, aside from the fact that the investigation is not confined to her sale of 50 shares to Pothast, the affidavits filed in this proceeding do not show whether the stock of Vacuum Can is closely held, or whether Mayer holds \$70,000 worth of the company's stock in the names of others. For obvious reasons the Commission should not be confined to such proof as is reflected in the affidavits submitted by the petitioners. Not only is it necessary to obtain more direct evidence to fulfill the heavy burden incident to proof of a fraudulent scheme, but verification of the statements appearing in the affidavits by examination of such original records as the stock books herein sought is necessary to guard against improvident institution of proceedings against innocent persons.

Unless the Commission is permitted to obtain sufficient evidence to prove violations of the securities laws, the statutes will necessarily have failed of their purpose. As this Court recently said in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 216:

[The Administrator's] investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited \* \* \* by forecasts of the probable result of the investigation \* \* \*" *Blair v. United States*, 250 U. S. 273, 282 \* \* \*

Clearly the Commission's investigation was not prompted by a "desire to commence a fishing expedition," as petitioners suggest (Pet. 19). The information reported to the Commission tended to show, if true, that certain violations of the laws administered by the Commission had been committed by Mayer in the sale of Vacuum Can stock. Obviously, to verify the truth of this information, and to determine whether other violations of the securities laws had been committed by her and to aid in the enforcement of

the Securities Exchange Act, it is appropriate for the Commission, in furtherance of its investigation, to gain access to the stock record books of Vacuum Can.

**CONCLUSION**

The decision below is so clearly correct that no further review would be warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,  
*Acting Solicitor General.*

✓ ROGER S. FOSTER,  
*Solicitor,*  
*Securities and Exchange Commission.*

✓ ROBERT S. RUBIN,  
*Associate Solicitor,*

✓ W. VICTOR RODIN,  
*Attorney.*

FEBRUARY, 1947.

## APPENDIX

Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a, *et seq.*):

SEC. 19. (b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subp<sup>ea</sup>na witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

SEC. 22. (b) In case of contumacy or refusal to obey a subp<sup>ea</sup>na issued to any

person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. 78a *et seq.*):

SEC. 21. (a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matter to which this title relates.

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subp<sup>ea</sup>na witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subp<sup>ea</sup>na issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer

any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.